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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 450

EASTERN AIR LINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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September 29, 1961.

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No. .....

EASTERN AIR LINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Petitioner, Eastern Air Lines, Inc. ("Eastern" or "Petitioner"), respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the District of Columbia Circuit to the end that this Court may review the judgment which the Federal Court of Appeals has rendered in the above entitled case.

Opinion of the Court Below.

The opinion of the Court of Appeals has not yet been officially reported. It appears as Appendix "A" to this Petition, and it is unofficially reported at 30 U. S. Law Week 2013 (Jul. 11, 1961).

The Order of the Civil Aeronautics Board ("the Board") which the Court of Appeals refused to set aside, has not been officially reported. It appears in the Joint Appendix in the Court below (hereinafter cited as "J. A. ....") at pages 1 through 314.

Grounds on Which this Court's Jurisdiction is Invoked.

This Court's jurisdiction is invoked for the following reasons:

(1) The Order of the Civil Aeronautics Board terminating, without deciding, the *General Passenger Fare Investigation* and the decision below of the Court of Appeals leave the public and the commercial air line industry without the assurance of just and reasonable fares provided for in the Civil Aeronautics Act of 1938 and the Federal Aviation Act of 1958. In view of the broad use of and reliance upon commercial air transportation in the United States and in view of the findings of Congress in Section 2 of the Civil Aeronautics Act[1] (reaffirmed in Section 102 of the Federal Aviation Act) that this industry is essential not only to the commerce of the United States, but also to its Postal Service and its national defense, the Board's abdication from regulatory responsibilities is a matter of grave public concern requiring the consideration of this Court.

(2) The decision of the Court of Appeals in this case conflicts with its prior decisions holding that

> (a) An administrative agency must decide all of the issues of law, fact and discretion presented on the record. Administrative Procedure Act, Section 8(b) (60 Stat. 242; 5 U. S. C. §1007); *Greensboro-Highpoint Airport Authority* v. *Civil Aeronautics Board*, 97 U. S.

[1] The Civil Aeronautics Act of 1938 has been superseded by the Federal Aviation Act of 1958 (72 Stat. 737; 49 U. S. C. A. §§1301 *et seq.*); however, proceedings instituted under the 1938 Act continue to be governed by it. Federal Aviation Act of 1958, Section 1501(b) (72 Stat. 809). The 1958 Act made no changes in the sections of the 1938 Act involved in this case. References herein to "the Act" are to the Civil Aeronautics Act of 1938.

App. D. C. 358, 231 F. 2d 517 (1956); *Minneapolis Gas Co.* v. *Federal Power Comm'n*, U. S. App. D. C. , 29 U. S. Law Week 2415 (Mar. 14, 1961) (No. 15452, Mar. 9, 1961); and

(b) An administrative agency, having initiated a rate investigation to determine whether fares are and will be just and reasonable, or if not, what fares would be just and reasonable, and having pursued such investigation through extensive hearings and Examiner's Initial Decision, exceptions, briefs, and oral argument, has no discretion to terminate the investigation without deciding the issue of the justness and reasonableness of fares. *Minneapolis Gas Co.* v. *Federal Power Comm'n, supra.*

(3) The decision of the Court of Appeals in this case conflicts with decisions of this Court and of other Courts of Appeals which have uniformly held that an administrative agency has an affirmative duty to administer the law committed to its enforcement. *NLRB* v. *Radio & Television Broadcast Engineers*, 364 U. S. 573 (1961); *Atlantic & Gulf Stevedores, Inc.* v. *Donovan*, 274 F. 2d 794 (5th Cir. 1960); *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y. 1951) (special three-judge court), *aff'd sub nom. Rederi* v. *Isbrandtsen Co.*, 342 U. S. 950 (1952).

(4) The Court of Appeals has decided an important question of Federal law which has not been directly before this Court in the last sixty years and which critically needs a statement of reaffirmation, as evidenced by the failure of the Court of Appeals in this case to follow the precedents of this Court.

(5) The decision of the Court of Appeals in this case has interpreted the question of the duty of an administrative agency to decide the cases arising thereunder in a way which conflicts with the decisions of this Court in *Louisville &*

N. R. R. v. *Behlmer,* 175 U. S. 648 (1900), and *East T. V. & G. Ry.* v. *Interstate Commerce Comm'n,* 181 U. S. 1 (1901).

The judgment of the Court of Appeals sought to be reviewed herein was rendered and entered on June 29, 1961.

Jurisdiction in this Court to review the judgment of the Court of Appeals, through the issuance of a writ of certiorari, is established by the provisions of 62 Stat. 928; 28 U. S. C. §1254. (The Court of Appeals is vested with jurisdiction by Section 1006 of the Civil Aeronautics Act.)

The Question Presented for Review.

The Civil Aeronautics Board is charged with administration of the Civil Aeronautics Act of 1938, including the requirement of §404(a) of that Act that air carriers charge only "just and reasonable" fares. Pursuant to that section, and others giving it broad investigatory and rate-making powers, the Board, on its own initiative, instituted the *General Passenger Fare Investigation* to determine whether existing fares are and will be just and reasonable, and if not, what fares would be, which investigation was pursued through extensive and exhaustive hearings, an Examiner's Initial Decision, exceptions, briefs, and oral argument before the Board. In view of its statutory obligation to regulate fares, and in view of its commitment to investigate, carried up to the point of decision, could the Board lawfully terminate the *General Passenger Fare Investigation* without deciding the only issue in it, the justness and reasonableness of fares?

Statutes Involved.

The statutes involved in this proceeding are applicable provisions of the Civil Aeronautics Act of 1938 and of the Administrative Procedure Act. The provisions involved

are lengthy, and their text is set forth in Appendix "B" hereto. The particular sections involved are:

CIVIL AERONAUTICS ACT OF 1938

Section 2 (52 Stat. 980; 49 U. S. C. A. §402);
Section 205 (52 Stat. 984; 49 U. S. C. A. §425);
Section 403 (52 Stat. 992, as amended by 70 Stat. 784; 49 U. S. C. A. §483);
Section 404 (52 Stat. 993; 49 U. S. C. A. §484);
Section 1002 (52 Stat. 1018; 49 U. S. C. A. §642);
Section 1006 (52 Stat. 1024, as amended by 63 Stat. 107; 49 U. S. C. A. §646).

ADMINISTRATIVE PROCEDURE ACT

Section 8(b) (60 Stat. 242; 5 U. S. C. §1007(b)).

Statement of the Case.

The proceedings below were instituted by the Civil Aeronautics Board, on its own motion, on May 10, 1956.[2] The Order of investigation stated[3] that the Board was proceeding under Sections 2, 205, 403, 404 and 1002(d) of the Civil Aeronautics Act of 1938. Following consideration of written statements and oral arguments of interested persons, the Board on July 27, 1956, issued a further Order[4] affirming the statement of the scope and issues in the original order of investigation. As so defined, the matter to be investigated and decided was:

> "• • • whether the fares and charges demanded, collected, and received by each of the respondents [the

[2] Order No. E-10279; J. A. 315a-324a.

[3] J. A. 316a.

[4] Order No. E-10488; J. A. 325a-333a.

> twelve domestic trunkline air carriers], individually or jointly with one or more of the other respondents, for the transportation of passengers within the continental United States, excluding Alaska, are generally unjust or unreasonable, and if found to be unjust or unreasonable, to determine what over-all percentage changes in the fares or charges of the respondents collectively or individually should be permitted or required.'"[5]

The *General Passenger Fare Investigation* commenced as a fare decrease case.[6] However, less than a year later the economics of the air line industry had changed radically for the worse, and seven of the respondents filed tariffs reflecting a six per cent increase in passenger fares to be effective April 1, 1957 (plus an additional increase of one dollar per ticket in the tariffs filed by Eastern and Capital Airlines). By Order E-11135 (Mar. 15, 1957) the Board suspended those tariffs and ordered an investigation to determine their lawfulness. The pendency of that investigation, known as the *Suspended Passenger Fare Increase Case,* Docket 8613, necessitated interruption of the *General Passenger Fare Investigation* until the former could be completed.[7] The six per cent increase was denied by the Board on September 25, 1957,[8] and the *General Passenger Fare Investigation* was resumed.

Subsequently, the Board has recognized—albeit, Eastern believes, inadequately—the need of the air lines for

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[5] J. A. 317a.

[6] In the Order defining the scope and issues the Board said, "What led to the institution of this investigation was our concern, based on the level of earnings reported by most of the respondents, over the possibility that the public was being subjected to excessive charges, overall, for passenger transportation. The purpose of this investigation is • • • to determine whether • • • the public is, in general, being charged too much • • •." J. A. 326a.

[7] Order No. E-11669 (Aug. 8, 1957); J. A. 339a.

[8] Order No. E-11812; 25 CAB 511.

additional income by permitting some modest relief from fares which had failed to keep pace with rising costs of operation.[9] Such increases were specified to be temporary, pending final decision of the *General Passenger Fare Investigation*, which the Board indicated would be the vehicle by which it would grant *permanent* and *fully adequate* relief.[10] The increases were allowed without reference to any evidentiary records and without findings that the resulting fares would be just and reasonable to the public and to the carriers.

Hearings in the *General Passenger Fare Investigation* commenced on November 18, 1957, and continued, with only brief recesses, for 142 hearing days. The record was closed

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[9] Order No. E-12203 (Feb. 25, 1958); CAB Press Release No. 58-64 (Oct. 14, 1958); Order No. E-13417 (Jan. 22, 1959); Order No. E-15436 (Jun. 23, 1960).

[10] *E.g.*, in CAB Press Release No. 58-5 (Jan. 24, 1958) announcing suspension of fare increases proposed by Trans World and Continental Airlines and indicating that it would approve a lesser increase, the Board said:

> "The increases to be allowed would be a straight four percent rise plus an additional charge of one dollar on each ticket. They would be effective until the Board's decision in its general passenger fare investigation, now in progress."

The tariff suspension thereby announced was made by Order No. E-12203 (Feb. 25, 1958), which also elaborated on the reasons for allowing a *temporary* increase.

CAB Press Release No. 58-64 (Oct. 14, 1958) indicated that the Board would allow the carriers to eliminate round trip and miscellaneous other discounts, *if* the tariffs doing so bore a cut-off date of July 31, 1959. That date was approximately the date by which the Board hoped, at that time, to have reached a final decision in the *General Passenger Fare Investigation.*

Order No. E-13417 (Jan. 22, 1959) allowed certain surcharges for travel on jet aircraft to become effective. Order No. E-15436 (Jun. 23, 1960), which allowed a small increase after announcement of the Board's tentative vote on sub-issues in the *General Passenger Fare Investigation,* directed that those surcharges and also a surcharge of one dollar on all tickets should expire on June 30, 1961. In view of the economic conditions in the industry, the carriers filed tariff amendments making those increases permanent, which the Board allowed without formal action.

on August 1, 1958. It comprised 13,357 pages of transcript of oral testimony and a comparable number of pages of prepared testimony and statistical materials.[11] Briefs to the Examiner were filed by all parties on October 28, 1958, and on May 27, 1959, the Examiner rendered an Initial Decision of 189 pages, plus 114 pages of appendices. Exceptions to the Initial Decision were filed on June 8, 1959, and briefs to the Board on July 15, 1959. The Board heard oral argument in the case on July 28-29, 1959, and took it under consideration.

On November 25, 1960, the Board rendered its Order No. E-16068, from which this appeal was taken.

Order No. E-16068 decided numerous sub-issues relating to legal and economic principles involved in determining the justness and reasonableness of passenger fares. However, it specifically avoided deciding the sole issue in the case as delineated by the order of investigation. The Board declined to decide whether existing fares are and will be just and reasonable in the future, or if not, what fares would be just and reasonable.

The pertinent language of Order No. E-16068 appears at J. A. 8, where the Board said:

> "Upon consideration of the record, the contentions of the parties, and Form 41[12] data for recent years, we conclude that the record before us is inadequate to permit the fixing of the fare level. However, the record does permit us to formulate significant standards which will contribute to the regulation of fares.
>
> "Our difficulty in attempting to prescribe the just and reasonable fare level from the present record is very basic. Neither the carriers nor Bureau

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[11] J. A. 367a.

[12] Form 41 is the form upon which all regularly scheduled passenger air lines are required to report to the Board voluminous information concerning their operations, traffic, revenues, expenses, financial condition, etc., on a monthly, quarterly, and annual basis.

> Counsel[13] have submitted forecasts of operations, revenues, and expenses which we find are reliable indicia of what future results will be. In addition, there is an absence of data in the record presenting the experience of operations with the new turbine-engine aircraft which are becoming an ever-larger element of the industry's operations. In these circumstances, it would be futile to attempt to prescribe the appropriate fare level on the basis of the record herein."

Having thus refused to decide the issues under investigation, the Board terminated the proceeding.[14]

Eastern filed a timely petition for review to the United States Court of Appeals for the District of Columbia Circuit, raising the issues now presented to this Court. Jurisdiction of that Court is established by Section 1006 of the Civil Aeronautics Act (52 Stat. 1024, as amended by 63 Stat. 107; 49 U. S. C. A. §646). By its judgment of June 29, 1961, that Court affirmed the Order of the Board.

It is Eastern's contention herein that the Board had no authority to terminate the *General Passenger Fare Investigation* without deciding the sole issue in it; *viz.*, the lawfulness or unlawfulness of fares. That contention is based upon two premises: first, that the Board had an obligation to enforce the Civil Aeronautics Act, and second, that after four and a half years of litigation, after some 25,000 pages of evidence have been assembled, after an Examiner has rendered an Initial Decision to which exceptions have been filed, after the parties have briefed the case to the Board and presented oral argument, then the parties and the public are entitled to a decision by the Board on a matter of grave public importance,—transportation rates.

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[13] The reference to "Bureau Counsel" is to counsel for the Commercial Rates Section of the Board's Bureau of Air Operations, a division of its staff, which was a party to the proceedings before the Board.

[14] J. A. 104.

ARGUMENT.

I.

The Civil Aeronautics Board Erred in Terminating the *General Passenger Fare Investigation* Without Deciding It, Because the Board Has a Statutory Duty to Assure Just and Reasonable Fares.

This Petition presents the basic issue of whether a Federal regulatory agency may shirk, as it chooses, one of the regulatory functions assigned to it by Congress. The Court below ruled that the agency has unfettered discretion either to enforce the statute or to disregard one of its major provisions. Petitioner submits that the Board and the Court of Appeals erred in reaching that conclusion.

The Civil Aeronautics Act of 1938 established in "Title IV—Air Carrier Economic Regulation" a complete program for governmental regulation, in the public interest, of the economics of the air transportation industry. That program was patterned after "The recognized and accepted principles of the regulation of public utilities, particularly as applied to other forms of transportation***."[15] Those principles provided for limited entry into the industry through issuance of certificates of public convenience and necessity (Section 401 of the Act) and for regulation of the carriers' fares, rates, and charges according to the accepted standard of "just and reasonable individual and joint rates, fares, and charges" (Section 404). The other provisions of Title IV are ancillary to these basic

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[15] S. Rep. No. 686, 75th Cong., 1st Sess., p. 2. This report dealt with S. 2 pending in that Session of Congress, which bill in substance became the Civil Aeronautics Act of 1938 in the Third Session.

aims and are not involved in this case. Title X of the Act, "Procedure," also contains ancillary provisions enabling the Board to investigate in formal hearings and through informal procedures and to issue orders compelling obedience to the statute.

The *General Passenger Fare Investigation* was instituted "pursuant to the Civil Aeronautics Act of 1938, as amended, particularly sections 2, 205, 403, 404, and 1002(d) thereof."[16] The Board's stated purpose was

> "* * * to determine whether the fares and charges demanded, collected, and received by each of the respondents [the twelve domestic trunkline air carriers], individually or jointly with one or more of the other respondents, for the transportation of passengers within the continental United States, excluding Alaska, are generally unjust and unreasonable, and if found to be unjust and unreasonable, to determine what over-all percentage changes in the fares or charges of the respondents collectively or individually should be permitted or required."[17]

After four and a half years of hearings, briefs, and arguments, and consideration of them by an Examiner and the Board, the *General Passenger Fare Investigation* was aborted. By its Order No. E-16068, from which this appeal was taken, the Board stated that it was unable to decide whether existing fares were just and reasonable and *terminated* the proceeding. Although Petitioner does not agree with the Board's conclusions concerning the adequacy of the record, that is not the issue raised here. Petitioner's sole complaint is that the Board *terminated* the proceeding without deciding the only issue in it. If the record made in the 142 days of oral hearings, covering 13,357 pages of

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[16] J. A. 316a.

[17] J. A. 317a.

transcript and a comparable number of pages of prepared testimony and statistical exhibits, was in fact inadequate for decision, then the Board had a statutory power and duty to reopen the record for the taking of further evidence. The point is, the Board could not just quit, leaving the public and the carriers alike with no determination of the justness and reasonableness of fares.

The consequences of the failure to make a decision below are grave indeed. As it turns out, the parties penalized by the Board's refusal to decide are the carriers. In a Press Release on April 29, 1960, prior to the issuance of its formal order, the Board announced it would allow the air lines as a group to earn an average rate of return of 10½ per cent.[18] The fact is that no carrier had earned a rate of return that high since 1957, and the industry as a group had not earned that high a return since 1956.[19] In 1960 the twelve trunk air lines earned a total net income of only $4,479,100 and five of them experienced net losses.[20] In the first six months of 1961 the trunkline carriers had a net loss of $13,197,352.[21] The intense competition among them prevents a unilateral fare increase by any one carrier, except on some few non-competitive segments,[22] and the anti-trust laws forbid them to agree upon a uniform increase for the industry. The Civil Aeronautics Board alone has the lawful power to assure fares which will produce the rate of return which it has heretofore found to be commensurate with just and reasonable fares.

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[18] CAB Press Release No. 60-10.

[19] J. A. 200-206.

[20] *American Aviation Daily*, May 22, 1961, which compiles the data from the carriers' official Form 41 reports to the Board, matters properly subject to official and judicial notice.

[21] *American Aviation Daily*, Jun. 12 & Sept. 7, 1961; see footnote 20.

[22] J. A. 79.

Petitioner believes that the present plight of the air line industry, which the Board's disregard for its statutory duty is perpetuating, sufficiently demonstrates the great public interest attached to this case. However, an assumed reversal of the economic situation may tend to point the matter out even more clearly. If, at the time the Board declined to perform its duty, the air lines had been earning a rate of return far in excess of what was fair, what redress would the travelling public have? Users of air transportation were represented in the Board proceeding by executive agencies of the United States: the Department of Commerce, the Air Force and the General Services Administration. Surely the courts would not exonerate the Civil Aeronautics Board from neglect of its duty if it had allowed the air lines to charge exorbitant fares. Just as surely, the air lines are entitled to protection from fares which are unreasonably low.

That the Board's jurisdiction over fares is an affirmative duty, not a discretionary power, was emphatically recognized by the Board in the Order terminating the case. In the portions of the Examiner's Initial Decision which the Board adopted as part of its own final decision, it is said:

> "Congress, by enactment of the Federal Aviation Act of 1958, has decided that the Government *should regulate* prices and profits and entry into business in the air-transportation industry and has assigned the Board the *duty* of performing this regulation. Contentions in this proceeding that the Board should ignore this *mandate* of Congress and should leave these matters to determination by competitive forces merit little consideration. *The Board must fix reasonable rates in proceedings raising the issue of such rates so long as the Act requires it to do so.* Requests for change in the Act should be addressed to Con-

> gress. However, it is appropriate to observe that the air-transportation industry is characterized by competition between two or more carriers for most of the high-density segments of the domestic-trunk-line route system. But the restriction on entry of new carriers into the business and of existing carriers into areas not covered by their certificates renders it impossible on this record to conclude that free-market forces can be depended upon to prevent either too low or too high returns on capital."[23] (Emphasis supplied.)

This statement is unequivocal. It cannot be reconciled with the Order terminating the case without deciding it. The Board specifically acknowledged that it "must fix reasonable rates in proceedings raising the issue of such rates." Not only was that issue raised in the *General Passenger Fare Investigation,* it was the *only* issue in the case. The Board had, and admitted in its Order that it had, a binding, inescapable statutory duty to decide it.

It should be observed that the Board did not find that there was no present need for it to exercise its rate-making powers. It did not find that the existing fares were just and reasonable. It did not find that competition and monopoly, within the framework of the certificated route pattern, were in that delicate balance where no rate regulation is necessary, but instead found that such regulation was essential in the public interest.

The Court of Appeals treated the above statement of the Board as a statement of the Hearing Examiner and as such, perhaps, entitled to less weight than would have been accorded to a statement of the Board itself (slip-sheet p. 4; p. 38 of Appendix A to this Petition). This misunderstanding of the source of the statement should be cleared

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[23] J. A. 109.

up. The statement was originated and written by the Examiner in his Initial Decision. It was adopted by the Board as its own finding of law and fact on sub-issues raised in exceptions to that Initial Decision. That the precise nature and import of the statement were considered by the Board prior to adoption may be appreciated from the fact that the Initial Decision served by the Examiner was 189 pages long, exclusive of the statistical materials appended to it. On the other hand, after the Board's eclectic review of it, the portion adopted and incorporated into the final Order was only 93 pages.

The Court below pointed out (slip-sheet p. 4; p. 38 of Appendix A to this Petition) that the Board acknowledged "that 'The Board must fix reasonable rates in proceedings raising the issue of such rates so long as the Act requires it to do so.'" The Court then said, "We agree the Civil Aeronautics Act imposes the stated duty upon the Board." Such interpretation of the Act is impossible to reconcile with its decision that, "The duty of the Board to prevent unjust and unreasonable rates, and to establish those that are lawful, does not require that the duty be performed as a result of this particular investigation" (slip-sheet p. 6; p. 40 of Appendix A to this Petition). The Court of Appeals correctly interpreted the Act, but failed to apply that interpretation to the case at hand. "This particular investigation" is certainly a "proceeding raising the issue" of just and reasonable rates. It had no other issue in it.

The question is presented here without complication: can a regulatory agency simply abandon and disregard its duty to regulate? The Court of Appeals answered that it could under the circumstances of this case. That Court thus summarized the Board's excuse for its dereliction: "As the investigation progressed changes in the airline carrier industry were occurring in such important and rele-

vant respects—particularly, the transition to turbine-engine craft—that the Board felt unable at this time to accomplish on the available data what initially it had set out to do". (slip-sheet p. 6; pp. 39-40 of Appendix A to this Petition).[25] The procrastination which resulted in a stale record was not attributable to the carriers. The hearings closed on August 1, 1958. The parties filed their briefs to the Examiner on October 28, 1958. The Examiner served his Initial Decision on May 27, 1959, which comprised 189 pages and an additional 114 pages of appendices. The carriers filed their exceptions twelve days later, on June 8, 1959. Briefs to the Board were filed on July 15, 1959. Oral argument was heard by the Board on July 28-29, 1959. The case then rested in the bosom of the Board until November 25, 1960, when it issued the Order from which this appeal was taken. At the time of oral argument, Capital Airlines' "Viscounts" were the only commercial transports in service which had turbine-powered engines.

The transition to turbine-powered aircraft is a strange excuse indeed for the Civil Aeronautics Board to offer to the air lines it regulates for its failure to assure them the just and reasonable fares to which they are entitled. The air lines themselves had pleaded that in cases involving the issue of "adequate service" to a community within the meaning of Section 404(b) of the Act could not be decided fairly in the jet age on the basis of a record made in the era of piston-powered aircraft. Such arguments received short shrift from the Board. For example, in the "Supplemental Opinion and Order on Reconsideration" in the *Washington-Baltimore Adequacy of Service Investigation,* Docket No. 8148, the Board said:

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[25] The Board's full statement of explanation appears at J. A. 8 and is quoted at pp. 8-9 of this Petition.

> "Eastern states that any possible basis which may have existed for the guideline has vanished because of the changeover to jet equipment and turbo-props which, it asserts, will be completed by the end of 1960, and which will result in drastic cost changes.
>
> "Nor do we find that the changeover in equipment has been such as to invalidate the premises of our order. Current schedules are part of the stipulated record before the Board, and we have been able to take into account such factors as the introduction of United's jet service to Chicago and thence to Denver."[26]

Again, in the "Supplemental Opinion" in the *Fort Worth Investigation,* Docket No. 7382, the Board said:

> "The plea for further hearing is one commonly advanced to the Board by disappointed litigants, and invariably has some color of foundation due to the rapid technological and economic changes in the industry. There is hardly a case heard by the Board which does not present substantial lapses of time since the evidentiary record was developed. Were we to hold new hearings for every change of equipment that ensued since the evidence was taken, there would be untold damage to the effective conduct of the Board's work. Accordingly, once a formal hearing has been held, further hearings are denied in the absence of unusual and compelling circumstances."[27]

In each of those cases the Board relied upon the information available to it through official notice of the reports which it requires the carriers to file with it at regular intervals (all operational, traffic, revenue, expense, and

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[26] Order No. E-16061 (Nov. 22, 1960), mimeo. pp. 12, 13; this Order was issued only three days prior to the Order appealed from here.

[27] Order No. E-15770 (Sept. 14, 1960), mimeo. p. 18.

investment data must be reported monthly). Such materials were equally available to the Board in the *General Passenger Fare Investigation* and were referred to by it in the Order.

In connection with the Board's stated excuse for failing to perform its statutory duty to regulate fares, the Court's attention is respectfully called to other Board action relative to fares at the same time it was failing to decide the *General Passenger Fare Investigation.* Following public announcement of the Board's tentative vote on sub-issues in that proceeding,[28] the carriers filed new tariffs reflecting application of the principles stated in the Press Release to their own economic situations, which tariffs were suspended by the Board subject to investigation of their lawfulness. In ruling upon the fare increases thus proposed, the Board said:

> "The Board has reviewed the fare proposals and has considered the revenue needs of each carrier, as well as the other statutory standards of rate-making, the statements filed by various carriers in support of their tariff proposals, and the competitive situation within the industry, which requires, as a practical matter, that fares for the same service be generally the same upon competitive segments. In its review of these tariff proposals the Board has employed the regulatory standards with respect to which it announced its tentative decision upon a number of issues in the *General Passenger Fare Investigation,* Docket 8008, and has considered the record in Docket 8008, *as well as the latest reported data filed by the carriers with the Board.*
>
> "Upon consideration of these matters, we conclude that each of the carrier's tariff proposals calls for greater increases than appear warranted, and that we should order an investigation thereof. • • •

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[28] CAB Press Release No. 60-10 (Apr. 29, 1960).

> "Based upon these same considerations, the Board has determined that it will permit tariffs which provide a general fare increase of 2.5 percent plus $1.00 per one-way ticket * * *."[29] (Emphasis supplied.)

The Board thus admitted that it had in its files sufficient information upon which to determine whether existing fares would be unjust and unreasonable in the future in the *General Passenger Fare Investigation.* Five months earlier it approved in the above-quoted Order a specific general fare increase as just and reasonable. If the data were inadequate at the later date, the Board could have followed the suggestion of Board Member Minetti in his statement concurring in the Order authorizing the 2.5 per cent plus one dollar per ticket increase:

> "* * * I state my belief that resumed hearings in the *GPFI* [*General Passenger Fare Investigation*], for the purpose of a full exploration and analysis of the economics of operation in the turbine era, are essential. Only with such information can we intelligently regulate rates and fares. We cannot, in the interest of the industry and the public, continue to proceed half-blind in this critical area."[30]

This Court will immediately recognize the incongruity in the Board's activities. In the *General Passenger Fare Investigation*, the Board failed, because of alleged record deficiencies, to make findings as to what fares will be just and reasonable, even though it had before it a voluminous record compiled at a cost of hundreds of thousands of dollars. Concurrently, however, the Board was allowing, as

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[29] Order No. E-15436 (Jun. 23, 1960).

[30] *Ibid.*, Minetti concurring.

not unjust or unreasonable, some fare increases *on no evidentiary record at all.* Quite obviously the Board was not helpless to carry out its statutory duty and, equally obviously, the public and the carriers are entitled to findings on a proper evidentiary record as to justness and reasonableness of fares.

When a regulatory agency considers the record before it inadequate for decision, it has an affirmative duty to investigate the deficiencies and to obtain such evidence as may be necessary to fill in the gaps. It was apparently the view of the Board, and of the Court below, however, that the Board had no such duty in this proceeding. The error of that view is apparent when compared with the following statement by Circuit Judge Frank in reply to a contention that the Shipping Board had no duty to inquire into unjust or unfair rate discrimination:

> "This is a somewhat surprising contention, to be contrasted with the following views of Commissioner Aitchison of the Interstate Commerce Commission concerning the obligations of administrative agencies: 'They are not merely expected to call balls and strikes, or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in * * *. The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting

ignorantly when intelligent action is possible * * *.'[24]

"[24] Senate Subcommittee Hearings on S. 674, S. 675 and S. 918, April 29, 1941, pp. 465-466."[30a]

Decided cases in the United States, without exception, support the principle that a regulatory agency has an affirmative duty to regulate and to secure additional evidence when it considers the record before it inadequate. In *NLRB* v. *Radio & Television Broadcast Engineers,* 364 U. S. 573 (1961), the Labor Board had, in accordance with its past policy, declined to decide a jurisdictional dispute between two unions. This Court reversed, holding that the Labor-Management Relations Act of 1947 empowered and directed the Board to decide such cases and that it must exercise its jurisdiction.

Under the Longshoremen's Act (44 Stat. 1424, as amended; 33 U. S. C. A. §§901 *et seq.*), the Deputy Commissioner is empowered to determine whether compensation is due an injured worker under the terms of that law, its remedies being exclusive. The Deputy Commissioner has an enforceable duty to make such determinations in claims presented to him. *Atlantic & Gulf Stevedores, Inc.* v. *Donovan,* 274 F. 2d 794 (5th Cir. 1960).

An insurance commissioner given broad investigative powers to determine compliance with the laws governing insurance companies was held to have an obligation to conduct investigations where reasonable cause appears in *Bankers Life & Cas. Co.* v. *Cravey,* 208 Ga. 682, 69 S. E. 2d 87 (1952). The court said:

"By conferring the power on the Commissioner, the law, in equal measure, lays upon him the duty to

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[30a] Isbrandtsen Co. v. United States, 96 F. Supp. 883 (S. D. N. Y. 1951) (special three-judge court), *aff'd sub nom. Rederi* v. *Isbrandtsen Co.,* 342 U. S. 950 (1952).

do so whenever there is an apparent need for information * * *."[31]

Other cases from the State courts recognizing the *duty* of an administrative agency to enforce the law committed to its administration, even when it is necessary for it to conduct a special investigation or to pursue one before it beyond the evidence submitted by the parties, include *Richfield Oil Corp.* v. *California Public Util. Comm'n*, Cal. 2d , 354 P. 2d 4, *cert. denied sub nom. Southern Counties Gas Co.* v. *Public Util. Comm'n*, 364 U. S. 900 (1960); *Anchor Coal Co.* v. *Public Service Comm'n*, 123 W. Va. 439, 12 S. E. 2d 406 (1941); *Publix Cars, Inc.* v. *Yellow Cab & Baggage Co.*, 130 Neb. 413, 265 N. W. 240 (1936); *Subscribers* v. *Speed Tel. Co.*, 34 P. U. R. 3d 32 (Mo. Pub. Serv. Comm'n, Case No. 14341, May 2, 1960); *Re Indianapolis Rys., Inc.*, 55 P. U. R. (n. s.) 374 (Ind. Pub. Serv. Comm'n, Case No. 16288, Aug. 29, 1944); *Rocky Mountain Motor Co.* v. *Pikes Peak Auto Livery*, 38 P. U. R. (n. s.) 255 (Colo. Pub. Util. Comm'n, Case No. 4835, Apr. 1, 1941).

The duty of an administrative agency to administer the law which created it is especially important in the area of public utility regulation, since a public utility is, by definition, a business affected with a public interest. In terminating the *General Passenger Fare Investigation* without any decision on the issue of just and reasonable fares, the Civil Aeronautics Board evaded that duty, with a severely deleterious effect upon the commercial air line industry. One of the twelve respondents, overwhelmed by its operating losses, has already been merged into another as a preferable alternative to bankruptcy.[32]

The Board asserted that its neglect of duty was justified by the fact that the air carriers were just beginning to inau-

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[31] 208 Ga. at 686, 69 S. E. 2d at 90.

[32] United-Capital Merger Case, Orders Nos. E-16605 (Apr. 3, 1961) and E-16880 (Jun. 1, 1961).

gurate service with jet aircraft, which put the industry in a state of economic flux the Board could not comprehend, the transition thus making fare regulation impossible. Petitioner asserts, on the other hand, that this time of transition, with great demands upon the carriers for funds with which to pay for the new jet aircraft, is the very time when the industry and the public it serves are most entitled to recognition of duty by the regulatory agency created to encourage and develop "an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."[33]

Beyond the public interest which attaches to the case at bar because of the nature of the industry involved, the decision below sets a dangerous precedent for the future action of administrative agencies. It should not be for the agency to determine whether the law should be enforced; that decision is reserved for the Congress which created the agency and adopted the law. If agencies are to be excused from administering the law because a particular case contains difficult issues or arises in a time of economic stress, the agency institution cannot survive. Public utility rate regulation will revert to the legislative branch of government, where it was performed before this Court's decision in *Smyth* v. *Ames*, 169 U. S. 466 (1898), or else fall under the supervision of the courts as it did from the *Smyth* case until the administrative agencies were given a freer hand in *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944).

The Civil Aeronautics Board is not the first agency to encounter difficult problems in regulation. The decisions in *Phillips*[34] and the *CATCO* Cases[35] have caused the Federal Power Commission to have to determine entirely new

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[33] Civil Aeronautics Act §2.

[34] Phillips Petroleum Co. *v.* Wisconsin, 347 U. S. 672 (1954).

[35] Atlantic Refining Co. *v.* Public Service Comm'n, 360 U. S. 378 (1959).

problems, perhaps the most difficult ones now extant in administrative law. Nevertheless, the courts have required that Commission to solve them without shortcuts,[36] and it appears that cases have been decided and other investigations commenced which may untangle the problem of producer regulation.[37]

The Civil Aeronautics Board also must be directed to enforce the law committed to its supervision. It must not be allowed to resign from its position of leadership in the industry it regulates, especially at a time when leadership is essential to this public service industry. Only a remand of this case to the Board with instructions to decide it can achieve that purpose.

II.

The Board Had No Discretionary Authority to Terminate the *General Passenger Fare Investigation* Without Deciding It After the Examiner Had Rendered An Initial Decision, the Parties Had Filed Exceptions and Briefs, and the Board Had Heard Oral Argument.

At some point in an administrative proceeding the agency becomes bound to render a decision. While it has discretion, within the bounds of the governing statute, to commence a proceeding or not, once it reaches the point of no return, it must pursue the matter to a conclusion. The

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[36] City of Detroit *v.* Federal Power Comm'n, 97 U. S. App. D. C. 260, 230 F. 2d 810 (1955), *cert. denied*, 352 U. S. 829 (1956); Episcopal Theological Seminary *v.* Federal Power Comm'n, 106 U. S. App. D. C. 37, 269 F. 2d 228, *cert. denied, sub nom. Pan American Petroleum Corp.* v. *Federal Power Comm'n*, 361 U. S. 895 (1959).

[37] Phillips Petroleum Co., FPC (Opinion No. 338, Sept. 28, 1960); proceedings in Permian Basin Area Rate Investigation, FPC Docket No. AR61-1, instituted Dec. 23, 1960.

exact point in a case when the agency becomes so committed appears not to have been determined, because all the decided cases have reached at least the stage reached by the Board in the case at bar. That point is the very threshold of decision; the evidence is in, an Initial Decision has been rendered, the parties have filed their exceptions and briefs, and the agency has heard oral argument. At least then, if not earlier, the parties are entitled as a matter of right to a decision on the issues of law, fact, and discretion presented. On this the cases are unanimous, save for that of the Court below in the instant one.

Petitioner urged the Court below that the instant case is "on all fours" with that Court's decision rendered three months before in *Minneapolis Gas Co.* v. *FPC*, U. S. App. D. C. , 29 U. S. Law Week 2415 (Mar. 14, 1961) (No. 15452, Mar. 9, 1961). In that case a natural gas company subject to the jurisdiction of the Federal Power Commission had filed a rate increase which the FPC had suspended subject to investigation. The case proceeded to hearing and in due course reached the same point which was reached in the *General Passenger Fare Investigation;* that is, oral argument had been heard following submission of briefs in support of exceptions to an Examiner's Initial Decision. In its final order the FPC ruled that there no longer appeared any need for the investigation and terminated it. The result of the termination was to allow the increased rates to become permanent future rates. The Minneapolis Gas Company, a local distribution company, and other representatives of consumer interests appealed from the order terminating, without deciding, the investigation. On appeal, the Court of Appeals for the District of Columbia Circuit ruled that the case had proceeded too far for the FPC to have discretion to terminate it with-

out a decision on the only issue in it, whether rates would be just and reasonable. The Court said:

> "We think the Commission cannot terminate a proceeding after it has actually conducted a hearing to the point of receiving an Examiner's initial decision, without rendering a decision upon the issue presented, which is the lawfulness of the proposed rates. We do not have before us, and therefore do not decide, whether the Commission may terminate a proceeding, once entered upon, at some point prior to the conclusion of the evidentiary hearing. A change of mind, midstream so to speak, may or may not be permissible. But we are of the opinion that the Commission, having received all the evidence the parties wish to present, and having before it an Examiner's findings, conclusion and decision, cannot at that point change its mind, wiping out the hearing as though it had never occurred, and in effect decide that it will not enter upon a hearing. The provisions of Section 4(e) [of the Natural Gas Act] seem to us to require that, if a hearing is held, all the pertinent evidence presented, and an initial decision rendered, the Commission is required either to let the initial decision stand as its decision or itself to render a decision.
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> "The substance of the difference between a termination of a proceeding, which is equivalent to a *nunc pro tunc* determination not to embark upon the proceeding, and a decision rendered upon the record is that the former lies within the broad discretion of the Commission, and so is not reviewable except for abuse, whereas the latter is circumscribed with requirements as to substantial basis and reasonable progress from that basis to the conclusion. The difference is not a mere technicality. It seems to us that the statute requires the Commission to make an early choice between its discretion and the binding necessities of a decisional process. It cannot, we

> think, pursue one course almost to the end and then protect its last step by reverting to its discretionary power. This may not be too important in the case at bar as a lone specific case, but as a general rule applicable to administrative proceedings generally, which it would be if we laid it down as a rule for this case, it would be a major error of considerable importance."[38]

The Court below attempted to distinguish the *Minneapolis Gas* case from the case at bar. At pages 5-6 of the slip-sheet opinion (pages 39-40 of Appendix A to this Petition) the Court said:

> "In a narrow procedural sense the point reached was similar to that reached in *Minneapolis Gas*, but the differences in the two proceedings render the procedural point reached in the two cases of quite different significance. This case was a general investigation of the general level of the passenger fares of all the trunkline carriers. It was not an inquiry into the justness and reasonableness of increases in rates set forth in a particular new tariff filed by a carrier. Moreover, as the investigation progressed changes in the airline carrier industry were occurring in such important and relevant respects—particularly, the transition to turbine-engine craft—that the Board felt unable at this time to accomplish on the available data what initially it had set out to do."

The Court below thus suggested two differences between the *General Passenger Fare Investigation* and the *Minneapolis Gas* case: first, the air line case involved the existing tariffs of twelve carriers rather than the new tariff of one carrier, and second, in the air line case the regulatory agency pleaded lack of ability to do the job at hand as its

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[38] Slip-sheet opinion pp. 6-7.

justification, whereas in the gas case the agency made an affirmative finding that under the circumstances surrounding the industry under its jurisdiction there was no longer any need to investigate that particular tariff. The alleged distinctions will be discussed in order.

Essentially, the first distinction made by the Court below amounts to this. If the investigation is precipitated by the filing of a new tariff by the utility and is instituted under Section 4(e) of the Natural Gas Act (52 Stat. 822; 15 U. S. C. A. §717c) or Section 1002(g) of the Civil Aeronautics Act (52 Stat. 1018; 49 U. S. C. A. §642), then representatives of the public are entitled to a decision. On the other hand, if the investigation is instituted by the agency under Section 5(a) of the Natural Gas Act (52 Stat. 823; 15 U. S. C. A. §717d) or Section 1002(d) of the Civil Aeronautics Act (which investigation must, *a fortiori,* be of an existing tariff and whether it should apply in the future), then the utility (or the public) is not entitled to a decision. That cannot be the law, because it is based upon the suggestion that the *General Passenger Fare Investigation* was merely an exercise to find out how much money the air lines were making and that no specific fares or tariffs were at issue. The Board's Order defining the scope of the investigation negates that interpretation of the Board's purpose:

> "What led to this investigation was our concern, based on the level of earnings reported by most of the respondents, over the possibility that the public was being subjected to excessive charges, overall, for passenger transportation. The purpose of this investigation is to explore into the level of earnings for each of the respondents to determine whether, in the light of such earning levels, the public is, in general, being charged too much (or too little); and, if so, to take such across-the-board action as would bring

> the general level of fares and charges in line with the level of earnings determined to be reasonable."[39]

The Board left nothing to the imagination. What it had in mind was a finding that every fare named in every passenger tariff of every carrier was unjustly and unreasonably high (or low) and should be reduced (or increased) by a specific amount. The carriers' tariffs could not have been any more directly in issue than they were. No distinction may be drawn, either, from the fact that *all* the fares in each tariff were subject to across-the-board adjustment. The tariff of a gas pipeline company contains many different rates for its different classes of service, which are ordinarily adjusted across-the-board in proceedings under both Section 4(e) and Section 5(a) of the Natural Gas Act. Thus this basis for distinguishing the *General Passenger Fare Investigation* from the *Minneapolis Gas* case is not well taken. (Nor would there be any real distinction in the fact that one case involved 12 respondents and the other one respondent.)

The second stated basis for distinction, that the Board was confounded by the changes taking place in the industry, rests upon no sounder ground than a plea that the Civil Aeronautics Act (and hence the Federal Aviation Act of 1958, since the two are identical in this respect) provides an unworkable plan of regulation. If an administrative agency cannot regulate air line fares under the flexible standard of "just and reasonable," how can they be regulated at all? Certainly the slower processes of the legislative and judicial branches of government proved to be ill suited for rate regulation. If the Civil Aeronautics Board cannot do it, then no one can. The public (and the

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[39] J. A. 326a-327a.

carriers) are entitled at least to an attempt at regulation. They cannot be protected by alleged administrative confusion or impotency.

Comparison of the reason given by the Civil Aeronautics Board for its refusal to decide this case with that given by the Federal Power Commission in *Minneapolis Gas* emphasizes the weakness of this alleged distinction. In *Minneapolis Gas* the Federal Power Commission made positive findings that:

> "• • • we are of the opinion that the rates fall within the zone of reasonableness and that the proceedings should be terminated leaving the proposed rates in effect.
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> • • •
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> "Taking into consideration all of these factors, the low price of this gas in relation to other prices in the area, the small increase requested, the fact that it is the only increase provided for in the contract during its 20-year term, the evidence of increased costs to Shamrock since the contract was executed and the need for still further investments in the future we are of the opinion that the rates of Shamrock are just and reasonable to the consuming public, and that further proceedings are unnecessary.
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> • • •
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> "It is necessary and appropriate to carry out the provisions of the Natural Gas Act to terminate the above-entitled proceedings, to deny the motion for oral argument and to deny the alternative request to reopen the proceedings." (Quoted at pages 3-4 of the slip-sheet opinion of the Court of Appeals.)

The FPC order thus made it clear that subsequent information acquired by it concerning the prices of gas in the same field, together with the evidence of record, demonstrated that it had improvidently commenced the investigation and

that it would be in the public interest for it to spend its regulatory time and effort in more fruitful proceedings. However, that manner of handling the case cut off the right of appeal of parties representing consumer interests, and as a result, the case was sent back to the FPC for decision.

In the case at bar, the Civil Aeronautics Board decided sub-issues in the case, including what was a fair and reasonable level of earnings. It further found that the carriers had not achieved that level of earnings in the preceding four years,[40] and its other Orders and Press Releases relating to fares all indicated a realization that they would not achieve it in the foreseeable future. Certainly in such a circumstance as this it had at least as great a duty to follow through to a decision on just and reasonable rates as the FPC was held to have in *Minneapolis Gas*. To use the Board's own phraseology of what should be done, it should be directed "to take such across-the-board action as would bring the general level of fares and charges in line with the level of earnings determined to be reasonable."[41]

Discussion under this heading has, up to this point, been limited to the decision of the Court below in *Minneapolis Gas vis-à-vis* its decision in the case at bar. However, other cases decided by it and by this Court portended the decision which had to be made in *Minneapolis* and which should be made in the case at bar. In *Greensboro-High Point Airport Authority* v. *Civil Aeronautics Board*, 97 U. S. App. D. C. 358, 231 F. 2d 517 (1956), the Board had failed to decide one of the issues in the case. The Court of Appeals remanded the case to the Board to decide that issue, either upon the record already made, or after receiving such additional evidence as the Board might find necessary.

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[40] J. A. 200.

[41] J. A. 327a.

Decisions of this Court in two connected cases also require decision of the issues in administrative proceedings. *Louisville & N. R. R.* v. *Behlmer,* 175 U. S. 648 (1900), and *East T. V. & G. Ry.* v. *Interstate Commerce Comm'n,* 181 U. S. 1 (1901), arose from the complaints of certain cities and state regulatory agencies to the Interstate Commerce Commission that the defendant railroads were violating Sections 1 (just and reasonable rates), 3 (preference, prejudice and discrimination) and 4 (long and short haul charges) of the Interstate Commerce Act (49 U. S. C. §§1, 3, & 4). The ICC ruled in favor of the complainants on the Section 4 issue and directed the carriers to file rates which would give the shorter haul the benefit of the lower rate. The railroads refused to file such rates, and the Commission obtained an enforcement order in the Circuit Court. On appeal, the Circuit Court of Appeals held that the Commission had interpreted Section 4 incorrectly and that the carriers had asserted a valid defense in the ICC hearing. However, the court further ruled that the rates were patently in violation of Section 3 and decreed that the Commission's order should be enforced for that reason. This Court held that both the ICC and the Circuit Court of Appeals had incorrectly construed the law and that the railroads had presented facts which would constitute a defense to both the Section 3 and the Section 4 charges. Nevertheless, said this Court, the issue of justness and reasonableness had not been ruled upon, and the parties were entitled to a decision. This Court instructed the Circuit Court to remand the cases to the Commission for decision of that issue upon the evidence already before it, or upon such further evidence as it might receive.

The decision of the Court below in the case at bar cannot be reconciled in principle with its own prior decisions in the *Minneapolis Gas* and *Greensboro* cases or with the

decisions of this Court in *Behlmer* and *East T. V. & G. Ry.* That conflict, and the manifest error of the Court of Appeals in this case, require decision by this Court in the interest of justice and clarity of the law.

Conclusion.

This case is deserving of treatment by this Court. The economic health of the commercial air line industry is a matter of broad, urgent public interest. Presently, its economic status is chaotic as a result of the resignation of the Civil Aeronautics Board from its responsibility for regulation, a resignation sanctioned by the decision of the Court of Appeals. There is no other way for the air lines to realize stable earnings at the level found reasonable by the Board than by a mandate from this Court to that agency to respond to its obligation to assure just and reasonable air fares.

The public also has an interest in just and reasonable air fares, an interest growing not merely out of the fact that it should not be overcharged, but also out of the carriers' need for adequate fares to assure the proper development of the nation's air transportation system. The Board and the Court below are in the untenable position of defending a situation where no one knows whether, and no one has found that, existing fares are just and reasonable despite five years of expensive litigation. The public deserves better treatment. It may lawfully demand a decision from the Board.

Moreover, the decision below is contrary to the decision of the same Court in a case decided only three months earlier. This conflict in the case law of the District of Columbia Circuit can be quite serious. Most of the Federal statutes creating administrative agencies provide for judi-

cial review in that Circuit. Neither litigant nor agency can know, now, whether the agency may just terminate a proceeding before it, cutting off all rights to judicial review, or whether it must, after reaching the point of decision, issue an order conforming to the requirements of Section 8(b) of the Administrative Procedure Act (60 Stat. 242; 5 U. S. C. §1007) that an agency decision shall "include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof," and also enabling aggrieved parties to pursue their rights in court.

For these reasons Petitioner urges this Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to the end that this Court may correct the error of the decision of the Court below.

Respectfully submitted,

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September 29, 1961

Appendix A.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16181.

EASTERN AIR LINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AMERICAN AIRLINES, INC.,
BRANIFF AIRWAYS, INC.,
CONTINENTAL AIR LINES, INC.,
UNITED AIR LINES, INC.,
WESTERN AIR LINES, INC.,
Intervenors.

ON APEAL FROM AN ORDER OF THE CIVIL AERONAUTICS BOARD.

Decided June 29, 1961.

Mr. HAROLD L. RUSSELL, with whom Mr. E. SMYTHE GAMBRELL was on the brief, for petitioner.

Mr. O. D. OZMENT, Associate General Counsel, Litigation, Civil Aeronautics Board, JOHN H. WANNER, General Counsel, Civil Aeronautics Board, JOSEPH B. GOLDMAN, Deputy General Counsel, Civil Aeronautics Board, WILLIAM F. BECKER, Attorney, Civil Aeronautics Board, RICHARD A. SOLOMON and ROBERT ALEXANDER HAMMOND, III, Attorneys, Department of Justice, were on the brief, for respondent. Mr. FRANKLIN M. STONE, General Counsel, Civil Aeronau-

tics Board at the time the record was filed, also entered an appearance for respondent.

Messrs. Howard C. Westwood, Alfred V. J. Prather and William H. Allen were on the brief for intervenor, American Airlines, Inc.

Mr. B. Howell Hill was on the brief for intervenor, Braniff Airways, Inc.

Mr. C. Edward Leasure was on the brief for intervenor, Continental Air Lines, Inc.

Mr. James Francis Reilly was on the brief for intervenor, United Air Lines, Inc.

Mr. John W. Simpson was on the brief for intervenor, Western Air Lines, Inc.

Before Prettyman, Bazelon and Fahy, *Circuit Judges.*

Fahy, Circuit Judge: Eastern Air Lines, Incorporated, petitions this court to review an order of the Civil Aeronautics Board of November 25, 1960.[1] The order terminated a Board proceeding known as the General Passenger Fare Investigation, which the Board had initiated May 10, 1956, on its own motion for the purpose, as stated by the Board, of determining

> [W]hether the fares and charges demanded, collected, and received by each of the respondents, individually or jointly with one or more of the other respondents, for the transportation of passengers within the continental United States, excluding Alaska, are generally unjust or unreasonable, and if found to be unjust or unreasonable, to determine what over-all percentage changes in the fares or charges of the respondents collectively or individually should be permitted or required.[2]

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[1] CAB, Order E-16068, Nov. 25, 1960.

[2] CAB, Order E-10279, May 10, 1956.

The scope of the possible orders to be issued on the basis of the investigation was limited to flat percentage changes in the fares of particular air carriers or groups of carriers. The twelve domestic trunkline carriers, of which Eastern is one, were made respondents. Other parties, including the United States through the General Services Administration, were made intervenors.[3] After a lengthy hearing and other very extensive and expensive proceedings, including Initial Decision by the Examiner, exceptions thereto, briefs and oral arguments before the Board, the Board entered the order complained of without determining the justness and reasonableness of existing trunkline passenger fares or the fares that would be just and reasonable. What the Board did is summarized in the following portion of its opinion:

> Upon consideration of the record, the contentions of the parties, and Form 41 data for recent years, we conclude that the record before us is inadequate to permit the fixing of the fare level. However, the record does permit us to formulate significant standards which will contribute to the regulation of fares.
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> Our difficulty in attempting to prescribe the just and reasonable fare level from the present record is very basic. Neither the carriers nor Bureau Counsel have submitted forecasts of operations, revenues, and expenses which we find are reliable indicia of what future results will be. In addition, there is an absence of data in the record presenting the experience of operations with the new turbine-engine aircraft which are becoming an ever-larger element of the industry's operations. In these circumstances, it would be futile to attempt to prescribe the appropriate fare level on the basis of the record herein.[4]

As indicated from the foregoing the investigation was not entirely barren. The Board discussed at considerable

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[3] CAB, Order E-10488, July 27, 1956.

[4] Order E-16068, at 3.

length, and made findings and conclusions respecting, to use its own language, "standards . . . for passenger fare regulation in four basic areas: profit element, rate base, depreciation, and taxes."[5] The Board further stated: "These standards will be used in assessing future fare proposals of the carriers, and in assisting the Board in evaluating the reported results of the carriers so that the Board may determine when action on its own motion should be taken."[6]

Eastern's petition for review, however, is not directed to these matters which were determined by the Board, but, as we have said, to its failure to decide the question of justness and reasonableness of fares, a principal if not the chief purpose for which the investigation had been instituted. Eastern seeks remand to the Board with directions to decide the case either upon the present record or after receiving additional evidence, contending that the Board erred in not performing its duty to regulate rates. Eastern points out that the Board has clearly recognized this duty, and that the Examiner's Initial Decision acknowledges that "The Board must fix reasonable rates in proceedings raising the issue of such rates so long as the Act requires it to do so."

We agree the Civil Aeronautics Act imposes the stated duty upon the Board.[7] Our recent decision in *Minneapolis Gas Co.* v. *Federal Power Comm'n*, ... U. S. App. D. C. ....., ... F. 2d ....., upon which Eastern heavily relies, is an instance where this court required the Federal Power Commission, having a comparable duty under the Natural Gas Act, to perform its duty by deciding a particular case in the circumstances there present. The Power Commission by order under section 4(e)[8] of the Act had entered upon a hearing concerning the lawfulness of a new schedule

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[5] Id. at 4.

[6] Ibid.

[7] See §404, 52 Stat. 993 (1938), as amended, 49 U. S. C. §1374 (1958); §1002, 52 Stat. 1018 (1938), as amended, 49 U. S. C. §1482 (1958).

[8] 52 Stat. 823 (1938), 15 U. S. C. §717c(e) (1958).

proposing increased rates filed with the Commission by a producer of natural gas. The Commission suspended the new schedule pending a hearing and decision. After a hearing the Examiner decided that the company had failed to sustain its burden of proof. The Commission, upon exceptions made, then terminated the proceedings, reciting in its order that the result was to leave the proposed rates in effect. While the order also recited that the rates were just and reasonable, this court concluded that in terminating the proceedings the Power Commission "did not render a decision" and that it should have done so. While there are similarities between that case and this, the dissimilarities lead us to a different result. There the hearing was directed to a particular new schedule of rates filed by a producer. A discretion resided in the Commission to permit the new tariff to go into effect or to enter upon a section 4(e) hearing as to the lawfulness of the increases. Having exercised its discretion to do the latter, and having pursued the course embarked upon through hearing, Examiner's decision and Board hearing on exceptions thereto, and thus having come to the point of decision, this court held that to terminate the proceedings and fail to decide the case was inconsistent with the Commission's obligation either to let the Initial Decision of the Examiner stand or itself to render a decision; that is, that the point of no return in the exercise of its discretion under section 4(e) had been passed.

In the end our question is whether in the present proceedings the Board reached a point where it could not lawfully exercise a discretion to terminate the proceedings. In a narrow procedural sense the point reached was similar to that reached in *Minneapolis Gas*, but the differences in the two proceedings render the procedural point reached in the two cases of quite different significance. This case was a general investigation of the general level of the passenger fares of all the trunkline carriers. It was not an inquiry into the justness and reasonableness of increases in rates set forth in a particular new tariff filed by a carrier. Moreover, as the investigation progressed changes in the airline carrier industry were occurring in such important and rele-

vant respects—particularly, the transition to turbine-engine craft—that the Board felt unable at this time to accomplish on the available data what initially it had set out to do.

The duty of the Board to prevent unjust and unreasonable rates, and to establish those that are lawful, does not require that the duty be performed as a result of this particular investigation. We cannot say that the Board decision not to decide the question of justness or reasonableness of the general level of trunkline fares requires this court to compel the Board to do so on this record or as it might be enlarged at this time, especially in view of the changes now under way in the industry. The Board's duty is to be performed in the context of particular proceedings. It is not mandatory in this one.[9]

While we neither commend nor condemn the Board for abandoning a principal objective of its investigation, after having subjected Eastern to a very substantial outlay of time and money, we are not convinced, as we were convinced in the circumstances presented by *Minneapolis Gas*, that the Board lost all discretion as to the course the investigation should take.

We have considered the Board's contention that, in any event, Eastern's petition for review should be dismissed because it is not adversely affected by the order. The statutory basis for review is that one must disclose "a substantial interest" in the order.[10] Our outline of the proceedings in this opinion, however brief, we think has sufficiently demonstrated that Eastern's interest in the order is substantial. Its claim of a right to obtain in the terminated proceedings a more definite decision as to its passenger rates, though a claim we do not enforce on the merits, is by no means so insubstantial that we are not required to consider it.

Affirmed.

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[9] Had the Board determined that existing rates were unjust or unreasonable the case would be different. Eastern does not contend that its rates are unjust or unreasonable.

[10] §1006, 72 Stat. 795 (1958), 49 U. S. C. §1486(a) (1958).

Appendix B.

Applicable Provisions of the Civil Aeronautics Act of 1938.

SEC. 2. [52 Stat. 980, 49 U. S. C. A. 402] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

SEC. 205. [52 Stat. 984, 49 U. S. C. A. 425] (a) The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make

and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act.

SEC. 403. [52 Stat. 992, as amended by 70 Stat. 784, 49 U. S. C. A. 483] (a) Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. • • •

(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein. • • •

(c) No change shall be made in any rate, fare, or charge, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, specified in any effective tariff of any air carrier or

foreign air carrier, except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this section. Such notice shall plainly state the change proposed to be made and the time such change will take effect. The Board may in the public interest, by regulation or otherwise, allow such change upon notice less than that herein specified, or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

(d) Every air carrier or foreign air carrier shall keep currently on file with the Board, if the Board so requires, the established divisions of all joint rates, fares, and charges for air transportation in which such air carrier or foreign air carrier participates.

SEC. 404. [52 Stat. 993, 49 U. S. C. A. 484] (a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

SEC. 1002. [52 Stat. 1018, 49 U. S. C. A. 642] (a) Any person may file with the Board a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provision of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and

there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Board to investigate the matters complained of. Whenever the Board is of the opinion that any complaint does not state facts which warrant an investigation or action on its part, it may dismiss such complaint without hearing.

(b) The Board is empowered at any time to institute an investigation, on its own initiative, in any case and as to any matter or thing concerning which complaint is authorized to be made to or before the Board by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Board shall have the same power to proceed with any investigation instituted on its own motion as though it had been appealed to by complaint.

(c) If the Board finds, after notice and hearing, in any investigation instituted upon complaint or upon its own initiative, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the Board shall issue an appropriate order to compel such person to comply therewith.

(d) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: *Provided*, That as to rates, fares, and charges for overseas air transportation,

the Board shall determine and prescribe only a just and reasonable maximum or minimum or maximum and minimum rate, fare, or charge.

(e) In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Board shall take into consideration, among other factors—

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

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(g)–Whenever any air carrier shall file with the Board a tariff stating a new individual or joint (between air carriers) rate, fare, or charge for interstate or overseas air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once, and, if it so orders, without answer or other formal pleading by the air carrier, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; and pending such hearing and the decision thereon, the Board, by filing with such tariff, and delivering to the air carrier affected

thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such tariff and defer the use of such rate, fare, or charge, or such classification, rule, regulation, or practice, for a period of ninety days, and, if the proceeding has not been concluded and a final order made within such period, the Board may, from time to time, extend the period of suspension, but not for a longer period in the aggregate than one hundred and eighty days beyond the time when such tariff would otherwise go into effect; and, after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Board may make such order with reference thereto as would be proper in a proceeding instituted after such rate, fare, charge, classification, rule, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed rate, fare, charge, classification, rule, regulation, or practice shall go into effect at the end of such period: *Provided,* That this subsection shall not apply to any initial tariff filed by any air carrier.

SEC. 1006. [52 Stat. 1024, as amended by 63 Stat. 107, 49 U. S. C. A. 646] (a) Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

Applicable Provisions of the Administrative Procedure Act.

SEC. 8. [60 Stat. 242; 5 U. S. C. 1007]

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(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented upon the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.